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APPLYING PUBLIC TRUST TESTS TO CONGRESSIONAL ATTEMPTS TO CLOSE NATIONAL PARK AREAS

*Peter Egan**

INTRODUCTION

Should Congress charge a commission with the task of recommending which National Park System Units, including the Statue of Liberty, the Golden Gate National Recreation Area, and the Fire Island National Seashore, warrant decommission or modification? House Bill 260, the National Park Service Reform Act, envisioned such a committee, but was rejected by the House in 1995. This Comment suggests that the Massachusetts Public Trust Doctrine provides a superior procedure for modifying and/or decommissioning park areas.

After a brief introduction to the public trust doctrine in Section I, Section II of this Comment details the development of the doctrine in the United States. Section III examines the Massachusetts and Wisconsin applications of the public trust, respectively. Section IV explores the public trust's pertinence to the Federal Government and Section V focuses on National Park System Units. After reviewing House Bill 260 in Section VI, the Comment concludes with an analysis of which method, that of Massachusetts, Wisconsin, or Congress, is best suited to modifying and/or decommissioning National Park System Units.

I. THE PUBLIC TRUST DOCTRINE

The public trust doctrine is based on the belief that various common properties, including rivers, the seashore, and the air, are held by the

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government in trusteeship for the public's unimpeded use.¹ According to Professor Sax, the idea of a public trusteeship is grounded upon three principles. First, because certain resources, such as the air and sea, are important to the citizenry as a whole, private ownership of such resources is unwise.² Second, because some resources, "partake so much of the bounty of nature, rather than of individual enterprise," they should be available to all citizens regardless of economic means.³ And third, the government should advance the general public interest instead of redistributing public resources for private gain.⁴

"By the law of nature these things are common to mankind—the air, running water, the sea and consequently the shores of the sea."⁵ According to this ancient principle, perpetual use of common properties "was dedicated to the public,"⁶ and incapable of private ownership.⁷ English common law modified this Roman version of the public trust by adopting the legal fiction that the Sovereign could and did own these common resources.⁸ Consequently, the public trust has been affiliated with the Sovereign's control of the beds of waterways, primarily for the purpose of advancing navigation, commerce, and fisheries.⁹

Ownership by the Crown, however, was limited.¹⁰ The Sovereign could not transfer public trust properties to a private party if the grant would interfere with the public interest.¹¹ Lord Bracton explained, "It is another rule of law, that public rights, and such things as are materially related to them, are inalienable."¹² As a result, "all things which relate peculiarly to the public good cannot be given over or transferred . . . to another person, or separated from the crown."¹³

¹ See JOSEPH SAX, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION* 163–64 (1970).

² See *id.* at 165.

³ *Id.*

⁴ See *id.*

⁵ Jan S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195, 196–97 (1980) (quoting the INSTITUTES OF JUSTINIAN 2.1.1 (T. Cooper trans. & ed., 1841)).

⁶ SAX, *supra* note 1, at 164.

⁷ See Alison Rieser, *Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of a Theory*, 15 HARV. ENVTL. L. REV. 393, 397–98 (1991).

⁸ See Rieser, *supra* note 7 at 398; Stevens, *supra* note 5, at 197–98 n.4.

⁹ See Stevens, *supra* note 5, at 195–96.

¹⁰ See Rieser, *supra* note 7, at 398.

¹¹ See *id.*

¹² Stevens, *supra* note 5, at 198 (quoting H. BRACTON, *ON THE LAWS AND CUSTOMS OF ENGLAND* 39–40 (S. Thorne trans., 1968)).

¹³ *Id.*

Consequently, the public interests of navigation, fishing, and commerce were protected from private ownership of waters influenced by the tide.¹⁴

II. THE PUBLIC TRUST DOCTRINE IN THE UNITED STATES

In 1821, the New Jersey Supreme Court enunciated a modern version of the public trust doctrine in the United States.¹⁵ According to that court, the Crown held rights in the beds of navigable waters in trust, for the common use of the people.¹⁶ The states succeeded to this trust, and a grant divesting the public of these common rights was void.¹⁷ This conclusion was adopted by the United States Supreme Court twenty-one years later in the case of *Martin v. Waddell*.¹⁸ According to Chief Justice Taney, "When the Revolution took place, the people of each State became themselves sovereign; and in that character held the absolute right to all their navigable waters, and the soils under them, for common use, subject only to the rights since surrendered by the constitution to the general government."¹⁹ Consequently, the *Martin* case supports the idea that common properties are held by the government in trusteeship for the free and unimpeded use of the general public.²⁰

After acquisition of the Northwest Territory and the Louisiana Purchase, state courts expanded the public trust doctrine to include navigable waterways not influenced by the tide.²¹ Unrestricted use of inland waterways was necessary for the development of the country.²² The public trust in the United States also expanded as concepts of the public right evolved to encompass diverse uses in addition to navigation and commerce.²³ In 1853, the Michigan Supreme Court held that the servitude of the public interest depends upon the purpose for which the public requires the use of its streams rather than upon any particular mode of use.²⁴

¹⁴ See *City of Long Beach v. Mansell*, 476 P.2d 423, 437 (Cal. 1960).

¹⁵ See *Arnold v. Mundy*, 6 N.J.L. 1, 10 (N.J. 1821); Stevens, *supra* note 5, at 199.

¹⁶ See *Arnold*, 6 N.J.L. at 10.

¹⁷ See Stevens, *supra* note 5, at 199.

¹⁸ *Martin v. Waddell*, 41 U.S. 367 (1842).

¹⁹ See *id.*

²⁰ See *id.*

²¹ See Stevens, *supra* note 5, at 196.

²² See *id.*

²³ See *id.*

²⁴ See *Moore v. Sanborne*, 2 Mich. 519, 525 (1853).

The public trust doctrine gradually has expanded to embrace a broad array of areas and activities.²⁵ For instance, in *Lamprey v. State*, the Minnesota Supreme Court explained that the lakes of that state are used by the people for sailing, rowing, fishing, fowling, bathing, skating, and other public purposes.²⁶ Consequently, the trust was expanded to include these inland bodies of water, although they were not navigable, and therefore not subject to a narrow interpretation of the public trust.²⁷ The court determined that allowing the transfer of lakes to private ownership, under an old or narrow test of navigability, "would be a great wrong upon the public for all time."²⁸

Similarly, California decisions have expanded the public trust doctrine to protect the general public's interests in recreation and heritage preservation.²⁹ Consequently, the scope of the public trust doctrine again has been extended beyond its traditional and narrow limits of navigable waterways. *Marks v. Whitney* expressly recognizes recreation as an activity protected by the trust.³⁰ In addition, *National Audubon Society v. Superior Court* identifies a state duty to protect the people's common heritage of streams, lakes, marshlands, and tidelands.³¹ That court stated, "One of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is preservation of these lands in their natural state."³² According to the court, by maintaining the tidelands in their natural state, "they may serve as ecological units for scientific study, for open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area."³³

III. COMPETING APPROACHES TO THE PUBLIC TRUST DOCTRINE

Massachusetts and Wisconsin have developed philosophically opposing approaches for grappling with public trust questions.³⁴ While

²⁵ See *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971); *Moore*, 2 Mich. at 525; *Lamprey v. State*, 52 Minn. 181, 199–200, (1893); Stevens, *supra* note 5, at 222.

²⁶ See *Lamprey*, 52 Minn. at 199–200.

²⁷ See *id.* at 200.

²⁸ *Id.* at 221.

²⁹ See *Marks*, 491 P.2d at 380; *National Audubon Soc'y v. Superior Court*, 658 P.2d 709, 724 (Cal. 1983).

³⁰ *Marks*, 491 P.2d at 380.

³¹ See *National Audubon Soc'y*, 658 P.2d at 724.

³² *Id.* at 719.

³³ *Id.*

³⁴ Compare *Robbins v. Department of Pub. Works*, 244 N.E.2d 577 (Mass. 1969) and *Gould v.*

Massachusetts has instituted procedural protections for public trust lands, Wisconsin courts guard against the waste of trust property by espousing a more substantive test.³⁵ The doctrines of both states shed light upon questions pertaining to public trust policy.³⁶ Congress attempted to restructure the National Parks System, which contains several similarities to public trust lands, in House Bill 260.³⁷ The remainder of this Comment will examine and compare the benefits and weaknesses of the Massachusetts, Wisconsin, and congressional methodologies.

A. *The Massachusetts Approach Toward the Public Trust Doctrine*

In Massachusetts, the Supreme Judicial Court (SJC) has adopted an approach that is designed to hold elected officials accountable for policies affecting public trust land, which includes lands dedicated to the public interest.³⁸ Skeptical of agency decisions made by unelected officials influenced by private interest groups, the Massachusetts courts mandate that explicit legislation direct the transfer of public interest land from one use to another.³⁹ The legislation must acknowledge the interest being surrendered as well as recognize the new use for the property.⁴⁰ The seminal case pertaining to the public trust doctrine in Massachusetts is *Gould v. Greylock Reservation Commission*.⁴¹ Mount Greylock (3,491 feet) is the highest peak of an isolated range surrounded by lowlands.⁴² In 1898, Massachusetts created the Greylock Reservation Commission (Commission) to purchase the Greylock State Reservation.⁴³ Then, in 1960, the Commission leased almost half of the reservation to a second state entity, the Mount

Greylock Reservation Comm'n, 215 N.E.2d 114 (Mass. 1966) with *City of Milwaukee v. State*, 214 N.W. 820 (Wis. 1927) and *Prieve v. Wisconsin State Land & Improvement Co.*, 67 N.W. 918 (Wis. 1896) and *State v. Village of Lake Delton*, 286 N.W.2d 622 (Wis. Ct. App. 1979).

³⁵ Compare *Robbins*, 244 N.E.2d at 579, and *Gould*, 215 N.E.2d at 114, with *Milwaukee*, 214 N.W. at 830, and *Prieve*, 67 N.W. at 921-22, and *Village of Lake Delton*, 286 N.W.2d at 632.

³⁶ See *Robbins*, 244 N.E.2d at 579; *Gould*, 215 N.E.2d at 126; *Milwaukee*, 214 N.W. at 830; *Prieve*, 67 N.W. at 921-22; *Village of Lake Delton*, 286 N.W.2d at 632.

³⁷ See H.R. 260, 104th Cong. (1995).

³⁸ See *Robbins*, 244 N.E.2d at 580; *Gould*, 215 N.E.2d at 126; Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 495-96, 502 (1970).

³⁹ See *Robbins*, 244 N.E.2d at 580; *Gould*, 215 N.E.2d at 126; Opinion of the Justices to the Senate, 424 N.E.2d 1092, 1100 (Mass. 1981); Sax, *supra* note 38, at 495-96.

⁴⁰ *Opinion of the Justices to the Senate*, 424 N.E.2d at 1100.

⁴¹ See *Gould*, 215 N.E.2d at 114.

⁴² See *id.* at 116.

⁴³ See *id.*

Greylock Tramway Authority (Authority), that was empowered to construct and operate a tramway on Mount Greylock.⁴⁴ The Authority subsequently entered into a management agreement with a joint venture corporation, American Resort Services, Inc. (Resort), to develop Mount Greylock as a ski resort.⁴⁵

The facts surrounding *Gould* led the court to view the Authority's actions as they pertained to the public trust skeptically.⁴⁶ For instance, as a consequence of the project's management agreement, Resort could receive forty percent of the development's profits.⁴⁷ Moreover, while the Authority was empowered statutorily to construct and operate a tramway,⁴⁸ the proposed ski area appeared to dwarf any development intended by the State legislature.⁴⁹ The resort would have included four chairlifts, totaling 14,825 feet, and eleven ski trails of a total length of 56,600 feet.⁵⁰ The *Gould* court was concerned that public lands would be diverted to Resort for promotion of its private interests.⁵¹

The Resort proposal was challenged by five citizens seeking a writ of mandamus and declaratory relief against the Commission and the Authority.⁵² Subsequently, the SJC held that the Commission's 1960 lease to the Authority was void.⁵³ The Court determined that the lease was not reasonably related to the Authority's statutory mandate.⁵⁴ The SJC then determined that the Authority acted beyond its delegated powers by entering into the management agreement for a ski resort.⁵⁵ According to the Court, "if a project of this magnitude in a State forest reservation had been intended, it would have been natural and appropriate for the enabling legislation to have stated that purpose much more definitely and described its scope more specifically than had in fact been done."⁵⁶

⁴⁴ See *id.* at 118.

⁴⁵ See *id.* at 120.

⁴⁶ See *Gould*, 215 N.E.2d at 119.

⁴⁷ See *id.* at 126.

⁴⁸ See *id.* at 118.

⁴⁹ See *id.* at 122.

⁵⁰ See *id.*

⁵¹ See *Gould*, 215 N.E.2d at 125.

⁵² See *id.* at 123.

⁵³ See *id.* at 124.

⁵⁴ See *id.* at 123, 124.

⁵⁵ See *id.* at 124.

⁵⁶ See *Gould*, 215 N.E.2d at 123.

Clearly, the Massachusetts legislature did not intend to preserve Mount Greylock permanently in its natural state.⁵⁷ Moreover, the governmental agencies overseeing the reservation were granted limited powers to contract between themselves and private parties.⁵⁸ Regardless, the SJC deemed the Commission's 1960 lease to the Authority and the Authority's management agreement void because they were beyond the scope of the agencies' statutory authority.⁵⁹ Rather than striking down a legislative initiative because it altered a public trust land, the SJC created an ingenious legal rule.⁶⁰ Essentially, the public interest may be diminished in two ways.⁶¹ First, the land in question may be delivered to a private interest, as was the case in *Gould*.⁶² Second, public land may be degraded or reduced physically.⁶³ However, the Court presumes that the state does not desire a reduction of the public interest.⁶⁴ This presumption will be removed by explicit legislation proclaiming the public interest to be served by a specific alteration to trust land.⁶⁵ The principle benefit of the Massachusetts approach is that the court is not placed in the unenviable position of nullifying legislation and insisting that the legislature has failed to act in the public interest.⁶⁶ Indeed, the court's presumption is that the legislature is acting to preserve public lands for broad public use.⁶⁷

Consequently, the Massachusetts courts oversee the granting of public trust lands while simultaneously providing for their modification as public interests develop and change.⁶⁸ Moreover, the power to enact such alterations rests with the legislature, a branch of government presumably responsive to public demands.

The Massachusetts Public Trust doctrine addresses another nagging problem confronting the transfer of public trust land.⁶⁹ How can

⁵⁷ See *id.* at 118; Sax, *supra* note 38, at 493.

⁵⁸ See *Gould*, 215 N.E.2d at 123, 125.

⁵⁹ See Sax, *supra* note 38, at 493.

⁶⁰ See *Gould*, 215 N.E.2d at 126; Sax, *supra* note 38, at 493.

⁶¹ See generally *Robbins v. Department of Pub. Works*, 244 N.E.2d 577 (Mass. 1969); *Gould*, 215 N.E.2d at 114.

⁶² See *Gould*, 215 N.E.2d at 120.

⁶³ See *Robbins*, 244 N.E.2d at 578.

⁶⁴ See Sax, *supra* note 38, at 494.

⁶⁵ See *id.* at 495.

⁶⁶ See *id.* at 494-95.

⁶⁷ See *Gould*, 215 N.E.2d at 121; Sax, *supra* note 38, at 494.

⁶⁸ See *Robbins*, 244 N.E.2d at 580; *Gould*, 215 N.E.2d at 126; Opinion of the Justices to the Senate, 424 N.E.2d 1092, 1100 (Mass. 1981)

⁶⁹ See Sax, *supra* note 38, at 496.

courts ensure that the general public's interest in trust land is weighed adequately against more particularly interested parties? When government agencies consider the allocation of public lands for private interests, public officials often will be subjected to intense lobbying on behalf of the proposed project.⁷⁰ Conversely, advocacy against such projects could be minimal because public sentiment is not alerted to preliminary agency actions.⁷¹ By calling for express legislative approval of policies affecting public lands, the Massachusetts courts are providing a more level playing field for competing public and private interests.⁷² Furthermore, through visible and open consideration of public land issues in the legislature, the public is able to hold decisionmakers accountable.⁷³ In the case of lower visibility agency decisions, there is no similar accountability because the agency head is most likely an appointed, rather than an elected, official.⁷⁴ The Massachusetts courts thereby are promoting a climate appropriate for determining policies which will affect lands held in common by all citizens.⁷⁵

The Massachusetts courts have developed a similar legal rule addressing alterations of public trust land which cater to public, rather than private, interests.⁷⁶ Professor Sax, for example, asks how conservationists' views can be represented adequately when a highway department proposes to build a road through parkland endowed to the public trust?⁷⁷ The park agency may, with little public visibility, grant the necessary property to the highway department.⁷⁸ Given such a scenario, many courts would hold that protection of the public interest is vested in the public agencies, which should not be second-guessed by the courts.⁷⁹

Massachusetts courts, however, force agencies to obtain specific, overt approval before altering public trust lands.⁸⁰ Consequently, agency proposals affecting public lands must be voted on by the

⁷⁰ See *id.* at 497-98.

⁷¹ See *id.*

⁷² See *id.* at 498.

⁷³ See *id.*

⁷⁴ See Sax, *supra* note 38, at 498.

⁷⁵ See *id.*

⁷⁶ See *Robbins v. Department of Pub. Works*, 244 N.E.2d 577, 580 (Mass. 1969); Sax, *supra* note 38, at 501.

⁷⁷ See Sax, *supra* note 38, at 496.

⁷⁸ See *id.* at 496-97.

⁷⁹ See *id.* at 498.

⁸⁰ See *Robbins*, 240 N.E.2d at 580.

legislature, and thereby exposed to public opinion.⁸¹ Although this rule developed from the courts' need to avoid conflict between agencies, it has grown into an effective tool for private citizens acting to protect the public interest.⁸²

An example of the Massachusetts doctrine as applied to inter-agency appropriation is found in *Robbins v. Department of Public Works*.⁸³ In that case, the plaintiffs attempted to enjoin the transfer of land from the Metropolitan District Commission (MDC) to the Department of Public Works (DPW). The DPW planned to build an extension of I-95 on the land in question.⁸⁴

The SJC in *Robbins* held that the land transfer was invalid.⁸⁵ The court explained that public lands devoted to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation authorizing the diversion.⁸⁶ The court determined that identification of the new use, as well as legislative awareness of the existing public use, was essential to such legislation.⁸⁷ In short, "the legislation should express not merely the public will for the new use but its willingness to surrender or forgo the existing use."⁸⁸ The court stated:

We think it is essential to the expression of plain and explicit authority to divert parklands, Great Ponds, reservations and kindred areas to a new and inconsistent public use that the Legislature identify the land and that there appear in the legislation not only a statement of the new use but a statement or recital showing in some way legislative awareness of the existing public use.⁸⁹

Consequently, the SJC has dealt effectively with two difficult problems pertaining to public trust litigation.⁹⁰ First, the Massachusetts approach precludes the courts from making public land policy.⁹¹ Second, the Massachusetts design ensures that public land policy is made

⁸¹ See Sax, *supra* note 38, at 502.

⁸² *Id.*

⁸³ See *Robbins*, 244 N.E.2d at 577.

⁸⁴ See *id.* at 579.

⁸⁵ *Id.* at 580.

⁸⁶ See *id.* at 579.

⁸⁷ See *id.* at 580.

⁸⁸ *Robbins*, 244 N.E.2d at 580.

⁸⁹ *Id.*

⁹⁰ See *id.*; Gould v. Greylock Reservation Comm'n, 215 N.E.2d 114, 126 (Mass. 1966).

⁹¹ See Opinion of the Justices to the Senate, 424 N.E.2d 1092, 1100 (Mass. 1981); *Robbins*, 244 N.E.2d at 579; Gould, 215 N.E.2d at 125.

in public view and by those politically accountable to the public's general will.⁹²

B. *The Wisconsin Approach Toward the Public Trust Doctrine*

In contrast to Massachusetts' procedural approach, Wisconsin courts apply a substantive test in decisions concerning the modification of public trust lands.⁹³ The origins of the Wisconsin approach can be traced to the case of *Prieve v. Wisconsin State Land & Improvement Co.*⁹⁴

In 1891, the legislature passed a special act, conveying to John Reynolds title to the lands underlying Lake Muskego and Wind Lake, and authorizing him to drain these lakes.⁹⁵ The purpose of the act was to preserve the public health and well-being of communities adjacent to the lakes.⁹⁶ Reynolds transferred his interests to the defendant corporation, which he formed for the purpose of improving and selling the land, and proceeded to drain the lakes.⁹⁷ In *Prieve*, the Supreme Court of Wisconsin held that it was not bound by the legislature's declaration of purpose.⁹⁸ In addition, the question of whether the act was designed to accomplish some public good or merely to advance a private gain was to be determined by the court.⁹⁹ Furthermore, the court held that the legislature had no power, under the guise of legislating for the public health, to authorize the destruction of the lakes for the benefit of private parties.¹⁰⁰

The *Prieve* case established two vital principles of the public trust doctrine in Wisconsin.¹⁰¹ First, Wisconsin courts are not obligated to defer to declarations of public purposes that underlie legislation affecting navigable waters.¹⁰² Second, if the purpose and effect of legislation affecting navigable waters is solely for the benefit of a private interest, the legislation is void.¹⁰³

⁹² See *Robbins*, 244 N.E.2d at 580; *Gould*, 215 N.E.2d at 126; Sax, *supra* note 38, at 492, 501-02.

⁹³ See *State v. Public Serv. Comm'n*, 81 N.W.2d 71, 73-74 (Wis. 1957); *State v. Village of Lake Delton*, 286 N.W.2d 622, 632 (Wis. Ct. App. 1979).

⁹⁴ See *Prieve v. Wisconsin State Land & Improvement Co.*, 67 N.W. 918 (Wis. 1927).

⁹⁵ See *Village of Lake Delton*, 286 N.W.2d at 629.

⁹⁶ See *id.* at 629-30.

⁹⁷ See *id.* at 630.

⁹⁸ See *id.*

⁹⁹ See *id.*

¹⁰⁰ See *Village of Lake Delton*, 286 N.W.2d at 630.

¹⁰¹ See *id.*

¹⁰² See *id.*

¹⁰³ See *id.*

In 1927, the Supreme Court of Wisconsin decided *City of Milwaukee v. State*.¹⁰⁴ In 1909, the legislature had passed an act ceding 1500 feet of land underlying Lake Michigan to the city of Milwaukee for harbor purposes.¹⁰⁵ In 1923, an amendment to the act authorized the city to fill, reclaim, and convey portions of the city's waterfront.¹⁰⁶ The Illinois Steel Company subsequently received a portion of this conveyance.¹⁰⁷ The company was authorized by an act of the legislature to fill in parts of the lake to aid commerce and navigation.¹⁰⁸ The construction of dock and wharf facilities was also approved by the legislature.¹⁰⁹

In an action by Milwaukee to quiet title in and to the specified lands under Lake Michigan, the Supreme Court of Wisconsin held for the city.¹¹⁰ The court's opinion noted that all public uses of Lake Michigan could continue in areas adjacent to the proposed projects.¹¹¹ The court balanced the inconvenience to Lake users with the planned economic and commercial benefits to the city.¹¹² Although Illinois Steel Company was a private entity, the Court distinguished this situation from *Prieue*, determining that the private benefits of the proposal were merely incidental to the procurement of public interests.¹¹³ These public benefits included improved navigation and commerce facilities.¹¹⁴

City of Milwaukee held that no single public interest, though afforded the protection of the public trust doctrine, is absolute.¹¹⁵ Some public uses must yield if other public uses are to exist at all.¹¹⁶ These interests must be balanced and accommodated on a case-by-case basis.¹¹⁷

Building on the *City of Milwaukee* holding, the Wisconsin Supreme Court, in *State v. Public Service Commission*, upheld an act that

¹⁰⁴ See *City of Milwaukee v. State*, 214 N.W. 820 (Wis. 1927).

¹⁰⁵ See *Village of Lake Delton*, 286 N.W.2d at 631.

¹⁰⁶ See *id.*

¹⁰⁷ See *id.*

¹⁰⁸ See *id.*

¹⁰⁹ See *id.*

¹¹⁰ See *City of Milwaukee v. State*, 214 N.W. 820 (Wis. 1927).

¹¹¹ See *Village of Lake Delton*, 286 N.W.2d at 631.

¹¹² See *id.*

¹¹³ See *id.* at 632; *City of Milwaukee*, 214 N.W. at 832.

¹¹⁴ See *City of Milwaukee*, 214 N.W. at 830.

¹¹⁵ See *Village of Lake Delton*, 286 N.W.2d at 632.

¹¹⁶ See *City of Milwaukee*, 214 N.W. at 832.

¹¹⁷ See *Village of Lake Delton*, 286 N.W.2d at 630-32.

granted authority to the city of Madison to fill approximately four acres (or one and one-fourth percent) of Lake Wingra for municipal purposes.¹¹⁸ The state legislature made this decision despite government findings that the project would reduce fish production from the lake by 1600 to 2000 pounds per year.¹¹⁹ The court, articulating a five-part balancing test, explicitly held that the plan did not violate the public trust doctrine.¹²⁰ First, public bodies would control the use of the area.¹²¹ Second, the area would be devoted to public purposes and open to the public.¹²² Third, the diminution of lake area would be very small when compared with the whole of Lake Wingra.¹²³ Fourth, no one of the public uses of the lake as a lake would be destroyed or greatly impaired.¹²⁴ Fifth, the disappointment of those members of the public who may desire to boat, fish, or swim in the area to be filled was negligible when compared with the greater convenience to be afforded those members of the public who use the city park.¹²⁵

Therefore, under the Wisconsin Public Trust doctrine, courts may strike down legislative declarations of public purpose.¹²⁶ If, however, a proposed development confers some type of public benefit, Wisconsin courts would apply the five-part balancing test.¹²⁷ Under the Wisconsin test, public trust lands are particularly susceptible to publicly owned developments which incrementally encroach upon trust property.¹²⁸ For example, in *City of Madison v. State*, the city was allowed to build an auditorium and civic center on filled areas of Lake Monona.¹²⁹

IV. APPLICATION OF THE PUBLIC TRUST DOCTRINE TO THE FEDERAL GOVERNMENT

The United States Supreme Court has never extended explicitly the public trust doctrine to the federal government. In *Illinois Cen-*

¹¹⁸ See *id.* at 632.

¹¹⁹ See *id.*

¹²⁰ See *id.*

¹²¹ See *id.*

¹²² See *Village of Lake Delton*, 286 N.W.2d at 632.

¹²³ See *id.*

¹²⁴ See *id.*

¹²⁵ See *id.*

¹²⁶ See *Prieue v. Wisconsin State Land & Improvement Co.*, 67 N.W. 918, 921-22 (Wis. 1896).

¹²⁷ See *State v. Public Serv. Comm'n*, 81 N.W.2d 71, 74 (Wis. 1957).

¹²⁸ See *City of Madison v. State*, 83 N.W.2d 674, 678-79 (Wis. 1957).

¹²⁹ *Id.* at 678.

tral Railroad Co. v. Illinois, the Court held that the public trust doctrine prohibits state disposition of lands under navigable waterways.¹³⁰ Furthermore, the Court in dictum noted that title to land under navigable waterways is "different from the title the United States holds in the public lands which are open to pre-emption and sale."¹³¹ This language has been interpreted to imply that the public trust doctrine, in its historical, English Common Law form, does not operate on federal inland public lands.¹³²

An argument can be made, however, that federal public lands are protected by the public trust. Despite the lack of an explicit expansion of the public trust to federal lands, a dominant theme within the public trust doctrine, as articulated both by the United States Supreme Court and state courts, is the state's duty to exercise continued supervision over the trust.¹³³ The states are burdened with the duty to protect their people's common heritage of streams, lakes, marshlands, and tidelands, surrendering that right of protection only in rare cases when such abdication is consistent with the purposes of the trust.¹³⁴

The federal government was created by the individual states, which delegated limited sovereign powers to the central government.¹³⁵ As a result, the federal government cannot have powers superior to the bodies responsible for its creation.¹³⁶ Therefore, like the states, the federal government presumably cannot abdicate its public trust responsibilities.¹³⁷

There is case law supporting application of the public trust to federal lands.¹³⁸ In *United States v. 1.58 Acres of Land*, Massachusetts feared that a federal taking would preclude state control over trust lands.¹³⁹ The United States had filed a Complaint in Condemnation to take waterfront property in Boston for use by the United States

¹³⁰ Charles F. Wilkinson, *Public Trust in Public Land Law*, 14 U.C. DAVIS L. REV. 269, 273 (1980).

¹³¹ *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892).

¹³² Wilkinson, *supra* note 130, at 273.

¹³³ See *Illinois Cent. R.R. Co.*, 146 U.S. at 453-54; *National Audubon Soc'y v. Superior Court of Alpine County*, 658 P.2d 709, 727 (Cal. 1983).

¹³⁴ See *National Audubon Soc'y*, 658 P.2d at 724.

¹³⁵ See ZYGMUNT J.B. PLATER ET AL., *ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY* 375 (1992).

¹³⁶ See *id.*

¹³⁷ *Id.*

¹³⁸ See *United States v. 1.58 Acres of Land*, 523 F. Supp. 120, 121 (D. Mass. 1981); *In re Steuart Transp. Co.*, 495 F. Supp. 38 (E.D. Va. 1980).

¹³⁹ *1.58 Acres of Land*, 523 F. Supp. at 121.

Coast Guard.¹⁴⁰ The Commonwealth of Massachusetts answered the United States' complaint, and argued that the United States could not obtain fee simple absolute in land lying beneath the low water mark in Boston Harbor.¹⁴¹ The United States District Court for the District of Massachusetts held that the United States may obtain full fee simple title to land below the low water mark without destroying the public trust which is administered by both the federal and state sovereigns.¹⁴² Therefore, although the federal government could take title to the land in fee simple, the public trust's duties and limitations applied equally to both the Commonwealth and the federal government.¹⁴³

Similar to *1.58 Acres*, in the 1980 case of *In Re Steuart Transportation*, the Federal Government again was held accountable to the public trust doctrine.¹⁴⁴ In that case, the Federal Government and the state of Virginia sued to recover for damages to waterfowl.¹⁴⁵ A barge carrying 19,700 barrels of oil sank in Chesapeake Bay and discharged a portion of its cargo.¹⁴⁶ The court found that the public trust doctrine supported both the federal and state damage claims.¹⁴⁷

That the public trust doctrine extends to the federal government is an unsettled point of law.¹⁴⁸ It is unlikely, however, that the doctrine exerts less responsibility on the federal government than the states.¹⁴⁹

V. APPLICATION OF THE PUBLIC TRUST DOCTRINE TO NATIONAL PARK SYSTEM UNITS

Application of the public trust doctrine to National Park System Units is a similarly unsettled point of law.¹⁵⁰ In *Sierra Club v. Andrus*, the Sierra Club's claim centered around federal water rights in Grand Canyon National Park, Glenn Canyon National Recreation Area, and

¹⁴⁰ See *id.*

¹⁴¹ See *id.*

¹⁴² See *id.* at 122.

¹⁴³ See *id.* at 123.

¹⁴⁴ *In re Steuart Transp. Co.*, 495 F. Supp. 38, 40 (E.D. Va. 1980).

¹⁴⁵ See *id.* at 39.

¹⁴⁶ See *id.*

¹⁴⁷ See *id.* at 40.

¹⁴⁸ Compare *1.58 Acres of Land*, 523 F. Supp. at 122, and *In Re Steuart Transp. Co.*, 495 F. Supp. at 40, with *Sierra Club v. Andrus*, 487 F. Supp. 443, 449 (D.D.C. 1980).

¹⁴⁹ See *1.58 Acres of Land*, 523 F. Supp. at 123; *In Re Steuart Transp. Co.*, 495 F. Supp. at 40.

¹⁵⁰ Compare *Andrus*, 487 F. Supp. at 449, with *Sierra Club v. Department of the Interior*, 398 F. Supp. 284, 293 (N.D. Cal. 1975), modified, 424 F. Supp. 172 (N.D. Cal. 1976); see also *Light v. United States*, 220 U.S. 523, 537 (1911); *United States v. Beebe*, 127 U.S. 338, 342 (1888).

Bureau of Land Management lands.¹⁵¹ Fearful that federal reserved water rights were subject to a serious threat of harm by energy-related developments, the Sierra Club sued Secretary of the Interior Andrus.¹⁵² The plaintiff sought a judgment ordering defendants to define, assert, and protect federal reserved water rights in water courses in southern Utah and northern Arizona.¹⁵³ In addition, the Sierra Club requested a declaration by the court that federal reserved water rights do exist in the water courses at issue in that case.¹⁵⁴

Asked to rule on statutory and trust violations by Secretary Andrus, the United States District Court for the District of Columbia decided that the Secretary had no duties and obligations distinct from those statutorily defined.¹⁵⁵ The court reasoned that the legislative history of the 1978 amendment to 16 U.S.C. § 1a-1 (entitled National Park System: administration; declaration of findings and purpose), made clear that any distinction between trust and statutory responsibilities in the management of the National Park System is unfounded.¹⁵⁶ In addition, Congress specifically choose 16 U.S.C. §1 to be the criteria by which National Park Service management should formulate policy.¹⁵⁷ The court in *Andrus* reasoned that, by asserting an explicit statutory standard as the basis of any judicial resolution of National Park Service management issues, Congress eliminated trust notions in National Park System management.¹⁵⁸ Without question, statutes regulate a plethora of federal land aspects.¹⁵⁹ Strong arguments can be made, however, that the public trust doctrine is not completely preempted from these lands.

That the federal government holds land in trust for its citizens is not a novel idea.¹⁶⁰ For instance, in *United States v. Beebe*, the Supreme Court noted that the public domain is held by the federal government as part of its trust.¹⁶¹ Moreover, the Court acknowledged,

¹⁵¹ *Andrus*, 487 F. Supp. at 445, *aff'd sub nom.* *Sierra Club v. Watt*, 659 F.2d 203 (D.C. Cir. 1981).

¹⁵² *See Andrus*, 487 F. Supp. at 444.

¹⁵³ *See id.* at 445.

¹⁵⁴ *See id.*

¹⁵⁵ *See id.* at 449.

¹⁵⁶ *See id.*

¹⁵⁷ *See Andrus*, 487 F. Supp. at 449.

¹⁵⁸ *See id.*

¹⁵⁹ *See Wilkinson*, *supra* note 130, at 269.

¹⁶⁰ *See United States v. Beebe*, 127 U.S. 338, 342 (1888); *see also Light v. United States*, 220 U.S. 523, 537 (1911).

¹⁶¹ *See Beebe*, 127 U.S. at 342.

"the government is charged with the duty and clothed with the power to protect the public domain from trespass and unlawful appropriation."¹⁶²

More recently, in *Sierra Club v. Department of the Interior*, the United States District Court for the District of Northern California concluded that the public trust imposed duties upon the National Park Service in addition to those statutorily created.¹⁶³ In that case, plaintiff Sierra Club brought an action against the Secretary of the Interior for declaratory and mandatory relief. Sierra Club alleged that the Secretary failed to discharge statutory and fiduciary duties to protect Redwood National Park from damage caused by logging operations.¹⁶⁴

The United States District Court for the Northern District of California held that a general trust was imposed upon the National Park Service by the National Park System Act, 16 U.S.C. § 1, to conserve scenery and natural and historic objects and wildlife within the National Parks, Monuments and Reservations.¹⁶⁵ Moreover, this duty obligated the National Park Service to provide for the enjoyment of the National Park units in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.¹⁶⁶ The Court's reasoning is further supported by the National Historic Preservation Act.¹⁶⁷ The purpose of this act is to preserve areas of common cultural, educational, aesthetic, inspirational, economic, and energy benefits for future generations.¹⁶⁸ In addition, Professor Wilkinson reports that there is an imposing and growing body of case law suggesting that the public trust doctrine applies to the public lands.¹⁶⁹

¹⁶² *Id.*; see also *Light*, 220 U.S. at 536.

¹⁶³ See *Sierra Club v. Department of the Interior*, 398 F. Supp. 284, 293 (N.D. Cal. 1975); see also *Knight v. United States Land Assn.*, 142 U.S. 161, 181 (1891) (deeming Secretary of Interior the guardian of the public lands).

¹⁶⁴ See *Department of the Interior*, 398 F. Supp. at 285.

¹⁶⁵ See *id.* at 287.

¹⁶⁶ See *id.*

¹⁶⁷ See National Historic Preservation Act of 1966, 16 U.S.C. § 470 (1994).

¹⁶⁸ See *id.*

¹⁶⁹ See Wilkinson, *supra* note 130, at 277 (citing *Kleppe v. New Mexico*, 426 U.S. 529, 539-40 (1976), *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 294-95 (1958), and others).

VI. CONGRESSIONAL PROPOSAL: HOUSE BILL 260

The National Park Service oversees 368 park units,¹⁷⁰ which are visited by 260 million people annually.¹⁷¹ The proposed legislation, House Bill 260, would have affected 314 National Historic Sites, Monuments, Recreation Areas, Preserves, and Heritage Areas.¹⁷² The nation's fifty-four National Parks were exempted from the bill.¹⁷³

House Bill 260, the National Park System Reform Act of 1995, provided for a review of the National Park System.¹⁷⁴ Accordingly, House Bill 260 would require the Secretary of the Interior to develop a "vision statement" for the National Park System within three years.¹⁷⁵ This report would identify the goals and objectives of the National Park System together with criteria for determining which themes and resources are appropriate in the system.¹⁷⁶ Also, lists of park areas to be added and removed from the National Park System would be included in the Secretary's review.¹⁷⁷

In addition, the bill would have created a National Park System Review Commission (NPSR Commission), charged with the task of proposing modifications to and the termination of specific park units.¹⁷⁸ The NPSR Commission would review the Secretary's report, or create the report itself in the event that the Secretary failed to do so.¹⁷⁹ This NPSR Commission, comprised of appointed, unelected officials would work with the Secretary of the Interior before forwarding its proposals to Congress, which could then vote on the recommendations individually.¹⁸⁰ More likely, however, would be a scenario similar to the

¹⁷⁰ See generally *The National Park System Reform Act: Hearings on H.R. 260 Before the House Subcomm. on National Parks, Forests, and Lands*, 104th Cong. (1995) (statement of Robin W. Winks, Professor of History, Yale University).

¹⁷¹ See 141 CONG. REC. H9095 (daily ed. Sept. 18, 1995) (statement of Rep. Mink).

¹⁷² See *id.*

¹⁷³ See H.R. 260, 104th Cong. § 102(b)(B)(1995).

¹⁷⁴ See *supra* note 171, (statement of Rep. Mink).

¹⁷⁵ See *Testimony of Congressman Joel Hefley, Feb. 23, 1995: Hearings Before the House Resources Subcomm. on National Parks, Forests and Public Lands*, 104th Cong. (1995) (statement of Rep. Hefley).

¹⁷⁶ See H.R. 260, 104th Cong. § 102(a)(1995).

¹⁷⁷ See H.R. 260 §§ 102(b), 201(b).

¹⁷⁸ See H.R. 260 § 103.

¹⁷⁹ See H.R. 260 § 103(a)(2).

¹⁸⁰ See 141 CONG. REC. H9092 (citing *Parks in Peril*, N.Y. TIMES, July 4, 1995).

military base closings, by which Congress either enacts or rebuffs the NPSR Commission's proposals in an all or nothing omnibus act.¹⁸¹

VII. ANALYSIS: THE MASSACHUSETTS PUBLIC TRUST DOCTRINE SHOULD BE APPLIED IN THE PROCESS OF DECERTIFYING NATIONAL PARK AREAS

The modern public trust doctrine, having expanded from its original purpose of promoting navigation and commerce, is now suited to provide a procedure for modifying National Park System Units.¹⁸²

According to Congress, the National Park System has grown to include superlative natural, historic, and recreation areas which express the United States' national heritage.¹⁸³ Created for the common benefit of all Americans, these areas, individually and collectively, increase national dignity and recognition of their superb environmental quality.¹⁸⁴ The National Park Service is charged with promoting and regulating National Park Units for the purposes of conservation, recreation, and enjoyment.¹⁸⁵ Moreover, this task is to be carried out in such a manner as will leave areas unimpaired for future generations.¹⁸⁶

Therefore, Congress has recognized that units within the National Park System possess three characteristics: (1) heritage value, (2) unique beauty, and (3) a retention of greater value through non-exclusive use.¹⁸⁷ These are the same attributes used to identify trust areas.¹⁸⁸

For example, in *National Audubon Society v. Superior Court*, the California Supreme Court recognized California's duty to protect the peoples' common heritage of streams, lakes, marshlands, and tidelands.¹⁸⁹ In *National Audubon Society*, the trust was being used for a purpose identical to that propounded by the National Historic Pres-

¹⁸¹ See *id.*

¹⁸² See National Park System: Administration, declaration of findings and purpose, 16 U.S.C. § 1a-1 (1991); *Robbins v. Department of Pub. Works*, 244 N.E.2d 577, 580 (Mass. 1969); *Gould v. Greylock Preservation Comm'n*, 215 N.E.2d 114, 126 (Mass. 1966).

¹⁸³ See 16 U.S.C. § 1a-1.

¹⁸⁴ See *id.*

¹⁸⁵ See Service created; director; other employees, 16 U.S.C. § 1.

¹⁸⁶ See *id.*

¹⁸⁷ See 16 U.S.C. § 1; 16 U.S.C. § 1a-1.

¹⁸⁸ Compare 16 U.S.C. § 1 and 16 U.S.C. § 1a-1 and 16 U.S.C. § 470, with *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 454 (1892) and *National Audubon Soc'y v. Superior Court of Alpine County*, 658 P.2d, 709, 724 (Cal. 1983) and *Marks v. Witney*, 491 P.2d 374, 380 (Cal. 1971).

¹⁸⁹ See *National Audubon Soc'y*, 658 P.2d at 724.

ervation Act.¹⁹⁰ That act declares that the spirit and direction of the nation are founded upon and reflected in its historic heritage.¹⁹¹ Because historically significant properties are being destroyed with increasing frequency, National Historic Sites are established to preserve cultural, educational, aesthetic, inspirational, economic, and energy benefits to future generations.¹⁹²

The protection of areas because of their unique beauty also has been a rationale used to invoke the public trust.¹⁹³ In *National Audubon Society*, the court regarded Mono Lake as a scenic and ecological treasure of national significance.¹⁹⁴ The belief that areas of particular beauty and historic value should be preserved resulted in the creation of the National Park System, which recognizes superlative natural, historic, and recreation areas.¹⁹⁵ Similarly, statutes establishing individual National Recreation Areas typically note outstanding scenic, recreational, and scientific features that justify the region's conservation and management.¹⁹⁶

The public trust also recognizes that certain areas achieve their greatest value when preserved for non-exclusive use.¹⁹⁷ For instance, in *Illinois Central Railroad Co. v. Illinois*, the Supreme Court struck down legislation that granted the railroad company exclusive rights to Chicago Harbor.¹⁹⁸ If the grant at issue in *Illinois Central Railroad Co.* was allowed to stand, the railroad would be empowered to destroy or greatly impair public uses of Lake Michigan.¹⁹⁹ More recently, in *Marks v. Whitney*, the California Supreme Court explicitly recognized that the objective of the public trust has evolved in tandem with the changing public perception of the values and uses of waterways.²⁰⁰ Consequently, the plaintiff was denied the right to use tidelands ex-

¹⁹⁰ See *id.*; 16 U.S.C. § 470.

¹⁹¹ See 16 U.S.C. § 470.

¹⁹² See *id.*

¹⁹³ See *National Audubon Soc'y*, 658 P.2d at 712; *Marks*, 491 P.2d at 374; *City of Madison v. State*, 83 N.W.2d 674 (Wis. 1957); *Wisconsin v. Village of Lake Delton*, 286 N.W.2d 622 (Wis. Ct. App. 1979).

¹⁹⁴ See *National Audubon Soc'y*, 658 P.2d at 712.

¹⁹⁵ 16 U.S.C. § 1a-1.

¹⁹⁶ See 16 U.S.C. § 460cc (1991) (establishing of Gateway National Recreation Area); see also 16 U.S.C. 460bb (1991) (establishing Golden Gate National Recreation Area); 16 U.S.C. § 460m-8 (1991) (establishing Buffalo National River).

¹⁹⁷ See *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 454 (1892); *City of Madison*, 83 N.W.2d at 678.

¹⁹⁸ See *Illinois Cent. R.R. Co.*, 146 U.S. at 454.

¹⁹⁹ See *id.*; *City of Madison*, 83 N.W.2d at 678.

²⁰⁰ See *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971).

clusively for the purpose of development.²⁰¹ The court noted that, "[t]here is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study [and] as open space."²⁰² The trust property was most valuable when preserved for non-exclusive use.²⁰³ This conclusion is similarly established in National Park System statutes.²⁰⁴ Because the public trust doctrine accounts for the very characteristics used in creating National Park System Units, trust procedures should be used to modify or decommitment of any such area.²⁰⁵

Whether or not courts will apply the public trust doctrine to National Park System Units, Congress should adopt the Massachusetts approach to public trust determinations before modifying park units. Two problems hinder House Bill 260's ability to reform the National Park System effectively and impartially. First, the NPSR Commission would be particularly susceptible to special interest pressures.²⁰⁶ Second, compared to actions and decisions taken at the congressional level, determinations by the unelected NPSR Commission would be relatively hidden from public view.²⁰⁷ By utilizing the Massachusetts doctrine, Congress will create a more level playing field on which special interest lobbying and the public's concern for parkland can be debated.²⁰⁸ In addition, the Massachusetts approach will promote political accountability by mandating that members of Congress, rather than a commission, explicitly cite the public benefits that the legislature is willing to modify or abandon.²⁰⁹

Compared with implementation of the Massachusetts public trust analysis, the procedures of House Bill 260 increase the risk that characteristics inherent in National Park System Units will be discounted or overlooked.²¹⁰ Initially, House Bill 260 would have directed

²⁰¹ See *id.* at 381.

²⁰² *National Audubon Soc'y v. Superior Court*, 658 P.2d 709, 719 (Cal. 1983).

²⁰³ See *Marks*, 491 P.2d at 380.

²⁰⁴ See 16 U.S.C. § 1; 16 U.S.C.A. § 1a-1.

²⁰⁵ See 16 U.S.C. § 1; 16 U.S.C. § 1a-1; 16 U.S.C. § 470; *Illinois Cent. R.R. Co.*, 146 U.S. at 452; *National Audubon Soc'y*, 658 P.2d at 724; *Marks*, 491 P.2d at 380.

²⁰⁶ Compare H.R. 260, 104th Cong. § 103 (1995), with Sax, *supra* note 38, at 502.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ See *Robbins v. Department of Pub. Works*, 244 N.E.2d 577, 580 (Mass. 1969); *Gould v. Greylock Preservation Comm'n*, 215 N.E.2d 114, 126 (Mass. 1966).

²¹⁰ Compare *Gould*, 215 N.E.2d at 126, with H.R. 260, 104th Cong. (1995).

the Secretary of the Interior to adopt a plan to evaluate all units within the National Park System, except for the fifty-four National Parks.²¹¹ After identifying sub-standard units, the Secretary would determine if other management alternatives, outside the National Park System, would be more efficient.²¹² Operation by state and local governments, as well as the private sector, were included in the bill as possible options.²¹³ Congress was to receive the Secretary's final report eighteen months after the criteria for evaluation had been selected.²¹⁴

House Bill 260 also would have created the National Park System Review Commission, to reviewed the Secretary's report, or, if the Secretary failed to develop and transmit a report, to develop the report itself.²¹⁵ Consisting of members appointed by the House, Senate, and administration, the NPSR Commission would recommend a list of National Park System units where National Park Service management should be terminated or modified.²¹⁶ Congress then would act on the NPSR Commission's findings either in part, in whole, or not at all.²¹⁷

The primary benefit of a commission-based approach is that recommendations would be made. Congress, although empowered to examine the park system itself, is unwilling to grapple with this politically difficult task.²¹⁸ In contrast, under House Bill 260, this analysis would be made by a relatively anonymous commission, whose members would not be beholden to voters.²¹⁹ House Bill 260 would allow Congress to abstain from politically difficult decisions and simply vote up and down on the NPSR Commission's recommendations.²²⁰ Any criticism then could be deflected by insisting that the cumulative effect of the action taken was in the best interests of the entire country.²²¹

²¹¹ H.R. 260, 104th Cong. § 101 (1995).

²¹² *See id.* § 102(b).

²¹³ *See id.*

²¹⁴ *See* H.R. 260, 104th Cong. § 102(d).

²¹⁵ *Id.* § 103(a).

²¹⁶ *See* H.R. 260, 104th Cong. (1995).

²¹⁷ *See id.* § 103(a)(3), (b).

²¹⁸ *See* 141 CONG. REC. H9093 (citation omitted).

²¹⁹ *See id.*

²²⁰ *See* 141 CONG. REC. H9087 (statement by Rep. Hefley); 141 CONG. REC. H9092 (citation omitted); 141 CONG. REC. H9091 (citation omitted).

²²¹ *See* 141 CONG. REC. H9092 (citation omitted); 141 CONG. REC. H9086 (daily ed. Sept. 18, 1995) (statement by Rep. Richardson).

House Bill 260, however, contains drawbacks. Rather than voting based on the particular characteristics of a particular area, the more likely scenario is that Congress will vote for or against the NPSR Commission's entire recommendation.²²² Such an omnibus bill, reminiscent of military base closings, could threaten valuable wilderness along with mediocre sites where management should be modified or eliminated.²²³ And, most importantly, establishment of the NPSR Commission allows the government's elected officials to escape shouldering responsibility for overseeing the National Parks System.²²⁴ The NPSR Commission could recommend that parks be closed, sold, or modified.²²⁵ Regardless of what action is suggested, citizens have no recourse against members of the Commission, who would determine effectively which units are closed if the omnibus bill scenario materializes.²²⁶ And, compared to the average citizen, lobbyists advocating for particular interests likely would exert the greatest amount of persuasive pressure upon a commission.²²⁷

Through application of Massachusetts' Public Trust Doctrine, political accountability would be infused into congressional action to modify and/or decommission National Park System Units.²²⁸ The legislative arm of government should be empowered to reform and strengthen the National Park System, which was established for the use and enjoyment of the public.²²⁹ Consequently, those modifying the system should be answerable to that public.²³⁰

Under the Wisconsin approach to public trust lands, Congress could declare policy itself, or delegate such authority to a separate body.²³¹ Any policy, however, could not be solely for the benefit of a private party.²³²

²²² See 141 CONG. REC. H9092 (citation omitted); 141 CONG. REC. H9091 (citation omitted); 141 CONG. REC. H9086 (daily ed. Sept. 18, 1995) (statement by Rep. Richardson).

²²³ See 141 CONG. REC. H9092 (citation omitted); 141 CONG. REC. H9086 (daily ed. Sept. 18, 1995) (statement by Rep. Richardson).

²²⁴ See 141 CONG. REC. H9092 (citation omitted); 141 CONG. REC. H9091 (citation omitted).

²²⁵ H.R. 260, 104th Cong. § 103(a)(3) (1995).

²²⁶ See H.R. 260, 104th Cong. § 103(b) (1995).

²²⁷ See Sax, *supra* note 38 at 496-97; Gould v. Greylock Preservation Comm'n, 215 N.E.2d 114, 126 (Mass. 1966).

²²⁸ See Robbins v. Department of Pub. Works, 244 N.E.2d 577, 580 (Mass. 1969); Gould, 215 N.E.2d at 126.

²²⁹ See 16 U.S.C. § 1a-1 (1991).

²³⁰ See Robbins, 244 N.E.2d at 580; Gould, 215 N.E.2d at 126.

²³¹ See City of Madison v. State, 83 N.W.2d 258 (Wis. 1957).

²³² See City of Milwaukee v. State, 244 N.W. 820, 829-30 (Wis. 1927); Priewe v. Wisconsin State Land & Improvement Co., 67 N.W. 918, 922 (Wis. 1896).

Courts, applying the Wisconsin Trust Doctrine, would not be bound by congressional declarations of public purposes underlying trust legislation.²³³ Furthermore, the burden of proving that modifications of trust land are for the public's benefit is squarely upon the government.²³⁴

Finally, if the legislation conferred a public benefit, the court then would apply the five-part balancing test to the proposed alteration, examining whether: 1) public bodies will control the use of the area; 2) the area will be devoted to public purposes; 3) the diminution of the area will be very small when compared with the whole; 4) a public use of the area will be destroyed or greatly impaired; and 5) the disappointment of those members of the public who desire to use the area will be negligible when compared with the greater convenience to be afforded by the new use.²³⁵

The benefits to be reaped from the Wisconsin scheme include the legislature's ability to delegate authority, which may be useful when poisonous political choices must be made.²³⁶ In addition, the Wisconsin courts encourage the legislature to manage the trust actively, allowing novel uses in trust areas, so long as pre-existing uses are not inhibited significantly.²³⁷ Moreover, Wisconsin employs a substantive test, endeavoring to protect trust areas from short-sighted legislative initiatives.²³⁸

The Wisconsin balancing test, however, leaves trust lands vulnerable.²³⁹ When scrutinized individually, the five elements of the test are easily satisfied by projects that could greatly transform and/or destroy trust lands.²⁴⁰ For example, so long as the trust area remains under state control and is used for some public interest, any development will have passed the first two elements of the Wisconsin test.²⁴¹ Next, part of the test asks if diminution of the area will be small when compared with the whole.²⁴² Consequently, any trust area could be destroyed incrementally, in small stages.²⁴³ Likewise, under the test's

²³³ See *Wisconsin v. Village of Lake Delton*, 286 N.W.2d 622, 630 (Wis. Ct. App. 1979).

²³⁴ See *id.* at 636.

²³⁵ See *id.*

²³⁶ See *State v. Public Serv. Comm'n*, 81 N.W.2d 71, 73 (Wis. 1957).

²³⁷ See *City of Milwaukee*, 244 N.W. at 831.

²³⁸ See *Public Serv. Comm'n*, 81 N.W.2d at 73.

²³⁹ See *City of Milwaukee*, 244 N.W. at 832; *Village of Lake Delton*, 286 N.W.2d at 632.

²⁴⁰ See *Village of Lake Delton*, 286 N.W.2d at 632.

²⁴¹ See *City of Madison*, 83 N.W.2d at 678.

²⁴² See *Public Serv. Comm'n*, 81 N.W.2d at 73-74; *Village of Lake Delton*, 286 N.W.2d at 632.

²⁴³ See *Village of Lake Delton*, 86 N.W.2d at 631.

fourth and fifth elements, trust areas are susceptible to incremental encroachments that chip away at a particular public use or enjoyment.²⁴⁴

A more logical approach to the decertification of National Park units is embodied in Massachusetts public trust case law.²⁴⁵ Under this doctrine, Congress would possess nearly unfettered authority to dispose of public lands.²⁴⁶ A reviewing court, however, would require that legislation transferring land from one use to another be explicit.²⁴⁷ The legislation would need to acknowledge the interest being surrendered, as well as the public use to which the land is to be put.²⁴⁸ Consequently, the Massachusetts approach promotes political accountability while simultaneously precluding courts from legislating public land policy.²⁴⁹

The Massachusetts approach is vulnerable to legitimate criticisms.²⁵⁰ For example, elected officials are forced to make decisions concerning trust lands in full public view.²⁵¹ Political momentum in favor of modifying or decertifying parkland will be difficult to maintain if Congress must explicitly cite the interests presently accommodated by a park unit. To identify these interests and at the same time modify or decommission a park unit will no doubt require a measure of political fortitude. In addition, under the Massachusetts approach, public resources intended to be saved for future generations can be undermined by a simple majority vote of a current legislature.²⁵²

CONCLUSION

The factors which make National Park areas analogous to public trust lands compel Congress to take a close look before decertifying National Park Units. The Massachusetts approach to public trust questions provides an unparalleled combination of flexibility in

²⁴⁴ See *id.* at 632.

²⁴⁵ See *Robbins v. Department of Pub. Works*, 244 N.E.2d 577, 580 (Mass. 1969); *Gould v. Greylock Preservation Comm'n*, 215 N.E.2d 114, 126 (Mass. 1966).

²⁴⁶ See *Robbins*, 244 N.E.2d at 580; *Gould*, 215 N.E.2d at 126.

²⁴⁷ See *Robbins*, 244 N.E.2d at 580; *Gould*, 215 N.E.2d at 126.

²⁴⁸ See *Robbins*, 244 N.E.2d at 580.

²⁴⁹ See *id.*

²⁵⁰ See generally *Gould*, 215 N.E.2d at 114.

²⁵¹ See *Robbins*, 244 N.E.2d at 580; *Gould*, 215 N.E.2d at 126.

²⁵² See *Robbins*, 244 N.E.2d at 580; *Gould*, 215 N.E.2d at 126.

land management together with political accountability. Therefore, to modify or decommission National Park System Units, Congress should adopt the Massachusetts approach rather than create the National Park System Review Commission envisioned in House Bill 260.